INDEX

Second Motion for Leave to File for Reconsideration 1

Motion for Reconsideration of Order of March 5, 1973 10

Brief in Support of Motion for Reconsideration 14

Introduction 14

Argument 15

I. The Order of March 5, 1973 15

II. The Lands Beneath Navigable Waters Are Held I Trust By A Sovereign State For All Its People 16

(a) *Texas* v. *Louisana* 16

(b) *United States* v. *California* 16

(c) *Pollard's Lessee* v. *Hagen* 16

III. A Sovereign State Cannot Be Deprived Of Such Lands By Mere Acquiescence 21

IV. The Cases Relied on in the Order of March 5, 1973, Must Be Read In The Light Of The Above Principles 24

Conclusion 28

TABLE OF AUTHORITIES

Cases

Barney v. Keokuk,
94 U.S. 337 (1876) ____ 24

Board of Health v. Greenville,
56 Ohio St. 1 (1911) ____ 7

Booth v. Shepherd,
8 Ohio St. 243 (1858) ____ 7

Christian v. New York Dept. of Labor,
No. 72-6520, decided January 21, 1974 ____ 3

Communist Party of Indiana v. Whitcomb,
No. 72-1040, decided January 9, 1974 ____ 3

Dan v. Lunsford,
84 N. Car. 337 (1876) ____ 21

Druco Corporation v. Illinois,
No. 73-963, pending on certiorari ____ 3

Durfee v. Duke,
375 U.S. 106 (1963) ____ 3

Fowler v. Lindsey,
3 Dallas 411 (1799) ____ 3, 27

Handley's Lessee v. Anthony,
5 Wheat. 374 (1820) ____ 27

Hinderlider v. LaPlata Co.,
304 U.S. 92 (1938) ____ 27

Hofman v. Blanck,
249 U.S. 335 (1959) ____ 3

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892) ____ 2, 6, 7, 12, 22, 26

Indiana v. Kentucky,
136 U.S. 479 (1890) ____ 14, 26, 27

Immigration & Naturalization Service v. Hibi,
No. 72-1652, 414 U.S. 5 ____ 4

International Paper Co. v. Mississippi,
217 So. 2d 395 (1973), cert. den. 414 U.S. 827 6
Louisiana v. *Mississippi*,
202 U.S. 1 (1906) 16, 26
Martin v. *Waddell*,
16 Pet. 367 (1842) 24
Maryland v. *West Virginia*,
217 U.S. 1 (1910) 16, 26
Massachusetts v. *New York*,
271 U.S. 65 (1926) 24
Michigan v. *Wisconsin*,
270 U.S. 295 (1926) 16, 26
Missouri v. *Iowa*,
7 How. 660 (1849) 26
Montana v. *Kennedy*,
366 U.S. 308 (1961) 5
New York v. *Connecticut*,
4 Dallas 4 (1799) 8, 27
Ohio v. *Kentucky*,
410 U.S. 641 (1973) 10, 15, 25
Oneida Indian Nation v. *County of Oneida*,
No. 72-861, decided January 21, 1974 6
Pollard's Lessee v. *Hagen*,
3 How. 212 (1845) 2, 7, 11, 12, 16
Rhode Island v. *Massachusetts* 12
12 Pet. 657 (1838) 25
13 Pet. 23 (1839) 25
14 Pet. 210 (1840) 13, 25
15 Pet. 233 (1841) 25
4 How. 591 (1846) 11, 16, 25, 26
Shively v. *Bowlby*,
152 U.S. 1 (1893) 24
State v. *Brown*,
67 Ill. 435 (1873) 21

State v. *Cleveland & Pittsburgh Railroad Co.*,
94 Ohio St. 61 (1916) ____ 33
State ex rel. Lott v. *Brewer*,
64 Ala. 287 (1879) ____ 31
State, ex rel. Squire v. *Cleveland*,
150 Ohio St. 303 (1948) ____ 36
Texas v. *Louisiana*,
410 U.S. 702 (1973) ____ 1, 7, 10, 11, 15, 16
Utah Power & Light Co. v. *United States*,
243 U.S. 389 (1917) ____ 1, 6, 7, 21
United States v. *California*,
332 U.S. 19 (1947) ____ 1, 6, 7, 11, 12, 16
United States v. *Desert Gold Mining Co.*,
433 F. 2d 713 (C.A. 9, 1970) ____ 3
United States v. *Maine*,
No. 35, Original ____ 24
United States v. *Nevada*,
No. 59, Original (1973) ____ 27
United States v. *Shotwell Mfg. Co.*,
355 U.S. 233 (1959) ____ 4
United States v. *Shotwell Mfg. Co.*,
371 U.S. 341 (1963) ____ 4
Vermont v. *New Hampshire*,
289 U.S. 593 (1933) ____ 16, 26
Virginia v. *Tennessee*,
148 U.S. 503 (1893) ____ 16, 26
Virginia v. *West Virginia*,
220 U.S. 17 (1911) ____ 2
Virginia v. *West Virginia*,
234 U.S. 117 (1913) ____ 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 27, Original

THE STATE OF OHIO

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

SECOND MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973.

On March 5, 1973, this Court entered an order denying Ohio's motion for leave to amend its original complaint. The purpose of the proposed amendment was to allege that the boundary between the two States lies at the middle of the Ohio River. The Court held this issue barred on the sole ground that Ohio had, for many years, acquiesced in Kentucky's claim to the northern half of the River. 410 U.S. 641, 643-652.

On October 2, 1973, Ohio asked leave to file a motion for Reconsideration of the order of March 5, 1973, contending that the Court's reliance on acquiescence was inconsistent with *Texas* v. *Louisiana*, 410 U.S. 702 (1973), *United States* v. *California*, 332 U.S. 19 (1947), *Utah Power & Light Co.* v. *United States*, 243 U.S. 389

(1947); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). In those cases the Court held that a sovereign, be it the United States, or a [illegible] cannot be deprived of territory within its boundaries by mere acquiescence in the adverse possession of another.

On October 23, 1973, the Court entered the following order:

> The motion for leave to file a petition for rehearing is denied. (Emphasis added.)

We submit that this disposition of the Motion for Reconsideration conflicts with other decisions of this Court, and we renew our request for leave to file the Motion for Reconsideration. There is no possibility of appeal to a higher court in an original case. And the Court has said, in *Virginia v. West Virginia*, 222 U.S. 17, 19-20 (1911):

> A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private businessman; it is enough if it proceeds, in the language of English Chancery, with all deliberate speed. . . .

We reproduce below both the Motion for Reconsideration and the Brief in Support thereof, as originally presented to the Court on October 2, 1973, with several minor modifications. The name of William B. Saxbe, United States Senator from Ohio, which appeared of counsel at that time, has been withdrawn in view of his subsequent appointment as Attorney General of the United States.

I.

Since the Court treated the Motion for Reconsideration as a petition for rehearing, we assume that leave to file was denied on the ground that it was untimely under

the Court's Rule 58. But an original action, instituted under this Court's Rule 9, is a trial, not an appellate proceeding; and Rule 9 provides that, in original actions the Court will take the Federal Rules of Civil Procedure as a guide wherever appropriate. It is a well recognized feature of trial practice that a trial judge, or a trial court, or the presiding officer in an administrative hearing, may, at any time before final judgment, be asked, by means of a motion for reconsideration, to change a previous ruling. See, e.g., *Communist Party of Indiana* v. *Whitcomb*, No. 72-1040, decided January 9, 1974, 42 Law Week 4129; and *Christman* v. *New York Dept. of Labor*, No. 72-6520, decided January 21, 1974, 42 Law Week 4181. In the latter case, this Court said (in footnote 10):

> * * * Moreover, a construction of the regulation as barring reconsideration and correction despite the State's failure to provide the notice required by the regulations might raise independent constitutional questions.

There can be no doubt that a trial court has inherent power to alter interlocutory rulings in a case, at any time prior to final judgment. That authority was succinctly expressed in *United States* v. *Desert Gold Mining Company*, 433 F. 2d 713, 715 (C.A. 9, 1970), as follows:

> * * * The judgment therefore *remained subject to reconsideration* and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned. * * * The question before this court then becomes whether or not the action taken was a proper exercise of judicial discretion. * * * Having in mind that one judge should not overrule another except for the most cogent reasons, we do not believe the action of the successor district judge was an abuse of discretion. * * *. (Emphasis added.)

See also *Hoffman* v. *Blaski*, 363 U.S. 335, 336-338, 340-

341, footnote 3 (1956); *United States v. Shotwell Mfg. Co.*, 355 U.S. 233 (1958); *United States v. Shotwell Mfg. Co.*, 371 U.S. 341 (1963).

If, as we have assumed, leave to file Motion for Reconsideration was denied as untimely, we submit that, in view of the foregoing, leave to file should not be granted.

II.

If, on the other hand, leave to file was denied on the ground that no good reason had been presented for reconsideration of the order of March 5, 1973, that decision should be reexamined. We recognize that, as the court of appeals said in *Desert Gold*, the question of reconsideration of a prior order is discretionary with the trial court and a change in the order should only be made for some cogent reason. There are such cogent reasons here.

This Court's order of March 5, 1973, denying Ohio's motion for leave to amend its complaint, was based solely on the ground that Ohio was estopped from claiming to the middle of the Ohio River, because it had acquiesced for many years in Kentucky's claim to the northern half of the River. The Court refused leave to file Ohio's Motion for Reconsideration on October 23, 1973. On that same day, however, the Court summarily reversed the Court of Appeals for the Ninth Circuit in *Immigration & Naturalization Service v. Hibi*, No. 72-1652, 414 U.S. 5. In that case the Commissioner of Immigration rejected as untimely the citizenship applications of an alien who had served in the armed forces of the United States, and who was entitled to citizenship provided his application had been filed on or before December 31, 1946. The record showed that officials of the Immigration Service had taken affirmative steps to prevent aliens such as this petitioner from being timely informed of their rights. Both

the district court and the court of appeals held that the Service was estopped from denying the petition. This Court reversed the decision below, without argument, and solely on the Solicitor General's petition for certiorari. The Court's opinion said (414 U.S. at p. 8):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.
>
> "As a genral rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. * * * A suit by the United States to enforce and maintain its policies respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or remove a cloud from it." *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 409.

The *Utah Power and Light* case, the sole authority relied upon by the Court, was one of the cases upon which we relied, in the Motion for Reconsideration, to show that the rule that a sovereign cannot be deprived of trust property by mere acquiescence applies to the States as well as to the United States. See Brief, *infra*. The summary reversal of *Hibi* cannot be reconciled with the simultaneous denial of leave to file Ohio's Motion for Reconsideration.

The opinion in *Hibi* did note that the issue of estoppel against the Government by "affirmative misconduct" had been left open in *Montana* v. *Kennedy*, 366 U.S. 308 (1961). But the Court found no such "affirmative misconduct" in *Hibi*, and certainly there is nothing in the present record which, by comparison with *Hibi*, could be so described. Even if there were such misconduct, the Mo-

[illegible] should not be summarily deprived of its title without full consideration, since that was the basis upon which it was originally [illegible]

Furthermore, the Court recently held that the Oneida Indian Nation could not be deprived of certain land in the State of New York despite a cession of such land by the tribe to the State in 1795. *Oneida Indian Nation v. County of Oneida*, No. 72-851, January 21, 1974. The Court held (slip opinion, p. 5) that Indian title "could be terminated only by sovereign act. * * * Indian title was [illegible] extinguishable only by the United States." Hence, the tribe could not be estopped by its unauthorized cession. Here, Ohio traces its claim of title back to the Indian tribes through their various treaties with the British Crown and with the United States. See Ohio's Brief in Support of Exceptions to the Special Master's Report, pp. 16-20.

It should be noted also that the Supreme Court of Mississippi recently held that the State legislature had no authority to convey, to private owners for private purposes, submerged land held in trust by the State for all its citizens. *International Paper Co. v. Mississippi*, 271 So. 2d 356 (1973). The conveyances had taken place in 1896, 1897 and 1917, and the corporation and its predecessors had paid taxes to the State, and had exercised full dominion over the land, from the time of the conveyances. A petition for certiorari was filed by the corporation and opposed by the State. In the course of the opposition, the State said in part (No. 72-1603, p. 10):

"The assertion that such sovereign rights can be lost to the people of the state because of the unauthorized acts of public officials of the state is the same theory rejected by this Court in *Illinois Central Railroad Co.*, 146 U.S. 387, and in *United States v. California*, 332 U.S. 19. * * *"

This Court denied the petition for certiorari on October 9, 1973, 414 U.S. 827.

In the brief in support of the Motion for Reconsideration, we called attention to repeated instances in which this Court has held that a sovereign, whether a State or the United States, cannot be deprived of its territory by mere acquiescence in the adverse claim of another. We relied on *Texas* v. *Louisiana*, *United States* v. *California*, *Utah Power & Light Co.* v. *United States*, *Illinois Central Railroad Co.* v. *Illinois*, and *Pollard's Lessee* v. *Hagen*, all *supra*. We urged that the cases upon which the order of March 5, 1973, relied, all involved something more than a mere acquiescence in an adverse claim, and that to read them otherwise would bring them into conflict with *California*, *Pollard*, and *Illinois Central*. See Brief in Support, *infra*.

The Court's opinion denying the motion for leave to amend refers to Ohio's failure to raise the present claim previously in this Court, to prior contrary admissions by Ohio officials, and to a decision by the Supreme Court of Ohio, involving two private parties, which is said to have explicitly recognized the validity of Kentucky's claim. 410 U.S. at 647-652. But the failure to institute an earlier action in this Court amounts to nothing more than mere acquiescence. The admissions of Ohio officials cannot be held to have estopped the State from claiming territory which belongs to her by sovereign right. *United States* v. *California*, *supra*, 332 U.S. at 39-40. And, as to the decision of the Supreme Court of Ohio, *Booth* v. *Shepherd*, 8 Ohio St. 243 (1859), we respectfully submit that this Court has simply misread that case.* But even if this

* The only issue between the two private parties in *Booth* was whether the Virginia-Ohio boundary lay at the top of the Ohio bank or at the low-water mark on the Ohio side. The opinion must be read as a whole in the light of that issue. The syllabus, which is controlling in Ohio, holds only that the territorial limits of the State extend at least to the low water mark on the Ohio side, 8 Ohio St. at 243. As late as 1912, the Supreme Court of Ohio again (as in *Booth*) refused to decide whether the territorial limits of the State extend to the center of the Ohio River, since the issue was only incidental to the case before it. *Board of Health* v. *Greenville*, 86 Ohio St. 1, 27-39 (1912).

Court's conclusion of North Dakota's consent; the finding effect ascribed to it with respect to the State of Ohio, which was not a party to the case, is inconsistent with this Court's decision in *Durfee v. Duke*, 375 U.S. 106 (1963). Third, a dispute between the two private parties as to ownership of land along the Missouri River between Nebraska and Missouri resulted in an action in a Nebraska court. That Court found the land to be in Nebraska and decided accordingly. The losing party then brought suit in Missouri and the case eventually ended in this Court which held the Nebraska decision to be res judicata. In the course of its opinion the Court said (375 U.S. at 115-116):

> It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question *between parties to the litigation there. Nothing there decided*, and nothing that could be decided in litigation between the same parties or their privies in Missouri, *could bind either Missouri or Nebraska* with respect to any controversy they might have, now or in the future, *as to the location of the boundary between them, or as to their respective sovereignty over the land in question. Fowler v. Lindsey*, 3 Dall. 411; *New York v. Connecticut*, 4 Dall. 1; *Lord v. Dollar*, 230 U.S. 731, 736-737. *Either State may at any time protect its interest by initiating independent judicial proceedings here.* Cf. *Missouri v. Nebraska*, 196 U.S. 23. (Footnote omitted—Emphasis added.)

The effect of the *Durfee* decision is involved in a presently pending petition for certiorari *Dravo Corporation v. Illinois*, No. 73-963.

In view of the inconsistencies noted above, we respectfully submit that this motion for leave to file should be granted, and that the Motion for Reconsideration should

be granted and referred to the Special Master for consideration and recommendation.

WILLIAM J. BROWN
Attorney General of Ohio,
GEORGE L. JENKINS
First Assistant Attorney General
JAMES A. LAURENSON
Chief Counsel
JOSEPH M. HOWARD
Assistant Attorney General

April, 1974.

19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 27, Original

THE STATE OF OHIO

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973

Comes now the State of Ohio, by its Attorney General, and requests that the Court reconsider its order of March 5, 1973. Under that order Ohio was refused leave to amend its original complaint by the addition of allegations which, if true, lead to the conclusion that the boundary between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the Ohio River. The Court's order of March 20, 1973, in *Texas* v. *Louisiana*, No. 36, Original, is inconsistent with the order of March 5, 1973.

1. The order of March 5, 1973, denying Ohio's request for leave to amend its complaint, was based solely on the conclusion that Ohio had, for many years, acquiesced in Kentucky's claim of sovereignty over the northern half of the Ohio River. *Ohio* v. *Kentucky*, 410 U.S. 641, 642.

652. The order placed reliance on a series of opinions by this Court, beginning with *Rhode Island* v. *Massachusetts*, 4 How. 591, 630 (1846), which contain language to the effect that one State may lose territorial rights by long acquiescence in the exercise of sovereignty and dominion over such territory by a sister State.

2. The order of March 20, 1973, decided, among other things, that a State plainly may not acquire title to land from the United States based on the acquiescence of the United States in the State's long continued exercise of jurisdiction. *Texas* v. *Louisiana*, 410 U.S. 702, 714. The authority cited for this holding was *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

3. In *California*, the Court held that the United States may not be deprived of interests, which it holds in trust for all the people, either by the acquiescence of its officers, or by their laches or failure to act. 332 U.S. at 39-40. An examination of the citations given to support this principle reveals that this Court has not hesitated to rely on cases from the State courts which apply the same rule to the States.

4. In *California*, the Court was concerned with the title, as between the United States and the State of California, to the three mile belt of soil under the marginal sea. The opinion discusses at considerable length, the inland water rule of *Pollard's Lessee* v. *Hagen*, 3 How. 212 (1845), in which the Court had held that the original States, as well as the States later admitted to the Union on an equal footing, owned the soil beneath the navigable waters within their boundaries, in trust for their people, and as an inseparable attribute of State sovereignty. In the *California* case the United States questioned the validity of *Pollard* insofar as it had held that ownership of the soil beneath navigable waters is a

necessary incident of State sovereignty. But the Court refused to accept this argument and stated that it had no jurisdiction over the soil beneath navigable waters, held in trust for all its people and from only dispose of such soil by a valid exercise of legislative power, consistent with its trust to the people of the State. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-453 (1892).

5. The line of cases upon which this Court relied in the order of March 5, 1973, must be read in the light of *Pollard's Lessee v. Hagan*, supra, *United States v. California*, supra, and *Illinois Central Railroad v. Illinois*. As already noted, the cases upon which the Court relied stem from *Rhode Island v. Massachusetts*, supra, in which the location of the boundary had been settled by a valid exercise of legislative power. Prior to the Revolution the two colonies had appointed commissions to meet and settle the boundary, and the recommended settlement was approved by each of the respective legislatures. Rhode Island's acquiescence was referred to in connection with this solemn agreement. 4 How. at 639-640. It will be found that in most of the other cases which follow the language of *Rhode Island*, there had also been a proper compact between the disputant States or some equivalent thereto. To read the language of those cases as holding that acquiescence, laches or failure to act are alone sufficient to deprive a State of an attribute of its sovereignty, is to place them in conflict with *Texas v. Louisiana*, supra, and with *Pollard*, *California* and *Illinois Central*.

6. The Ohio River is a navigable stream, and Ohio is a riparian State. Assuming the truth of the allegations in Ohio's proposed amended complaint as to the location of the boundary in the middle of the River, which allegations have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern

half of the River belongs to Ohio, in trust for her people, and as an attribute of her sovereignty as a State. It cannot be [illegible] by [illegible]. The location of the boundary can only be settled by a compact between the two States or by a decree from this Court.

The Court said, in its order of March 5, 1973, 410 U.S. at 644, that its object in original cases is:

> * * * to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.

But the Court has also said, in *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257 (1840):

> * * * it will be the duty of the court to mould the rules * * * to bring this case to a final hearing on the *real merits*. (Emphasis supplied.)

And the Court has said in *Virginia* v. *West Virginia*, 234 U.S. 117, 121 (1913), that its guiding principle in such cases should be that

> * * * there may be no room for the slightest inference that * * * anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. * * *

We respectfully submit that the order of March 5, 1973, which deprives Ohio of an opportunity to present the real merits of its case, should be reconsidered.

WILLIAM J. BROWN
Attorney General of Ohio,

GEORGE L. JENKINS
First Assistant Attorney General

JAMES A. LAURENSON
Chief Counsel

JOSEPH M. HOWARD
Assistant Attorney General

April, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 27, Original

THE STATE OF OHIO

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

Ohio was admitted to the Union in 1803, as a sovereign State, on equal footing with Kentucky and with the thirteen original States. The allegations of Ohio's proposed amended complaint, if proven, will establish that, when she became a State, Ohio's boundary with Kentucky lay at the middle of the Ohio River and that she was entitled to the soil beneath the northern half of the River. Kentucky's argument to the contrary was found to be without merit by the Special Master. (Rep. 3-4.)*

The Special Master recommended, nevertheless, that the motion to amend the complaint be denied, his reason was that, regardless of where the boundary actually lay

* Reference is to the Report of the Special Master, filed May 15, 1972 and designated herein as "Rep."

at the time Ohio became a State, her long acquiescence in Kentucky's claim to the northern edge of the River foreclosed Ohio's present claim to the northern half of the River. (Rep. 4-10.) The Special Master relied upon a series of cases in this Court which contain language to the effect that, in border disputes between States, long acquiescence by one in the claim of the other is conclusive. (Rep. 12-13). In an opinion dated March 5, 1973, this Court accepted the Special Master's recommendation and cited the same cases. *Ohio v. Kentucky*, 410 U.S. 641, 650-651 (1973).

On March 20, 1973, this Court handed down its opinion in *Texas v. Louisiana*, 410 U.S. 702, in which it held, among other things, that a State may not acquire territory from the United States by prescription and acquiescence. 410 U.S. at 714. We submit that the same rule holds good for any sovereignty, that a sovereign State can no more be deprived of its territory by mere acquiescence than can the sovereign United States, and that the cases upon which this Court relied in its opinion of March 5, 1973, must be read in the light of this principle.

An original action in this Court is, of course, a trial, and interlocutory orders entered therein are open to reconsideration at any time prior to final judgment.

ARGUMENT

I. The Order of March 5, 1973.

The basis of this Court's denial of leave to amend Ohio's complaint appears in the following paragraph in the opinion of March 5, 1973 (410 U.S. at 650-651):

> Ohio does not say that its failure to assert its claim over the past century and a half is due to any excusable neglect. The implications of *Howdy* and later decisions of this Court are too clear to support

[redacted] credibly suggest that it has not acquiesced. The rule, long settled and never doubted by this court, [redacted] is that long acquiescence by one state in the possession adverse to another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and political authority." Michigan v. Wisconsin, 270 U.S. 295, 308 (1926). To like effect are Vermont v. New Hampshire, 289 U.S. 593, 613 (1933); Maryland v. West Virginia, 217 U.S. 1, 17, 42-43 (1910); Louisiana v. Mississippi, 202 U.S. 1, 52-54 (1906); Virginia v. Tennessee, 148 U.S. 503, [redacted] (1893); Indiana v. Kentucky, 136 U.S. 479, at 509-510, 518 (1890); Rhode Island v. Massachusetts, 4 How. 591, 639 (1846)." [Footnotes omitted.]

As will be seen below, the language of the cases cited in this passage must be read in the light of other cases in this Court which hold that, upon admission to the Union, a State, taking title to all unappropriated lands within its boundaries, and especially to the soil beneath its navigable waters, to be held in trust for the people of the State as an attribute of its sovereignty, the State cannot be deprived of such property except by a valid exercise of its legislative power, consistent with the public trust under which the lands are held.

II. The Lands Beneath Navigable Waters Are Held in Trust by a Sovereign State for All Its People.

The statements in the last paragraph above are borne out by an examination of the Court's opinions in (a) Pollard v. Hagan, supra; (b) United States v. California, 332 U.S. 19 (1947); and (c) Pollard's Lessee v. Hagan, 3 How. 212 (1845).

a.) Texas v. Louisiana. The Court decided that the

boundary between the two States had been established at the middle of the Sabine River in 1848. However, since there was some evidence that islands in the western half of the river were owned by the United States prior to 1848, the case was remanded to the Special Master to permit the government to state its claim. Texas had argued that such claim had been lost by prescription and acquiescence. The Court brushed aside this contention with the statement that the United States could not lose territory by acquiescence. The opinion says (410 U.S., at 713, 714):

> It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. *Scott* v. *Lattig*, 227 U.S. 229, 242-243 (1913); *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874); *Pollard's Lessee* v. *Hagen*, 3 How. 212, 226-230 (1845). But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States. • • •
>
> • • • • • • • • • • • •
>
> • • • Texas claims any such islands existing prior to 1848 by prescription and acquiescence, but, plainly, a State may not acquire property from the United States in this manner. *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

b.) *United States* v. *California*. The issue was the ownership of the three mile belt of soil beneath the marginal sea. California contended that, since it had been admitted to the Union on equal footing with the original States, its ownership of the subsoil of the marginal sea followed from the rule announced in *Pollard's Lessee* v. *Hagen*, *supra*. This Court's opinion in *California* describes that rule as a holding, 332 U.S. at 35, that

> • • • the original states owned in trust for their people the navigable tidewaters between high and

[illegible] water, [illegible] state's boundaries, [illegible] as an incident of [illegible] sovereignty.

The Government questioned the validity of Pollard insofar as it held that ownership of the soil beneath navigable waters is a necessary incident of State sovereignty. The Court did not accept this argument, pointing out that it had frequently reasserted the basic doctrine of Pollard. 332 U.S. at 36-37. It did, however, limit the extent of the Pollard rule to inland waters, and held for the United States on the ground that the soil beneath the marginal sea is an attribute of external national sovereignty. 332 U.S. at 39-40. Finally, in response to California's argument that the federal government had lost its claim through acquiescence in the State's exercise of sovereignty, the Court said:

> And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who [illegible] authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by [illegible] acquiescence, laches or failure to act." (332 U.S. at 39-40, footnote citing cases omitted.)

c. *Pollard's Lessee v. Hagan.* The question was ownership of a lot which had been under navigable waters within the boundaries of Alabama at the date that State was admitted to the Union. One party claimed under a grant from the United States, the other, under

set Alabama grant. The Court's opinion notes (3 How. 220) that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy. * * *." The Court held, as we have just shown from the references to *Pollard* in *Texas* and *California*, that any State which entered the Union after the Revolution acquired title to the soil beneath the navigable waters within its boundaries, in trust for the people of the State, as an inseparable attribute of its sovereignty. In addition to the passage already quoted the opinion says (3 How. at 221, 222-223, 228-229, 230):

> * * * The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; * * *
>
> * * * * * * * * * * * *
>
> * * * When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territory.
>
> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign powers. * * *
>
> * * * * * * * * * * * *
>
> Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine,

III. A Sovereign State Cannot Be Deprived of Such Lands By Mere Acquiescence.

In the above quotation from *United States v. California*, in which the Court held that the United States could not be deprived of trust property by acquiescence, we noted that a footnote containing authorities for that proposition had been omitted. 332 U.S. at 40. One of these authorities is *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, (1917), which in turn cited a number of this Court's previous cases on the same point. But the *Utah Power* opinion also cites *State ex rel. Lott v. Brewer*, 64 Ala. 287, 296 (1879), *State v. Brown*, 67 Ill. 435, 438 (1873), and *Dev v. Lunsford*, 20 N. Car. 407 (1838), all of which hold that a sovereign State may not be deprived of its property by the acquiescence or laches of its officers. The following passage from the *Brown* case is typical:

> It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at a fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officials, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.
>
> The doctrine is well settled that no *laches* can be imputed to the government, and by all the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials. (67 Ill. at 438.)

The reference from these State cases shows that this Court recognized all accretions as equally entitled to the benefit of the rule. Furthermore, the Court has held that a State may vary the boundaries of the soil beneath its navigable waters by a valid exercise of its legislative power consistent with its trust for the people of the State, and that any legislative disposition inconsistent with such trust is void. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-454, 454-455, 460 (1892), the Court said:

> "* * * the State holds title to the lands under the navigable waters of Lake Michigan, within its limits, * * * It is a title held in trust for the people of the State that they may enjoy the navigation * * * carry on commerce * * * and have liberty of fishing therein freed from the obstruction or interference of private parties. * * *
>
> "It is *grants of parcels of land* under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust in the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of that general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of a State to preserve such waters for the use of the public. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the remaining lands and waters, and then only to the extent and under the conditions prescribed by the legislature. The decisions of the State courts, to the effect that the title and dominion of property acquired by the general government in the bays, rivers and lands under the navigable waters of the lakes, within the limits of the States in which they are situated, are held by the same tenure, and may be dealt with by the States to the same extent as the lands above high-water mark within their jurisdiction, may be supported by reasons which we do not feel called upon to controvert. But the decisions of the State courts, that the control of the State over the lands under the navigable waters of lakes and rivers is so entire that it may be wholly surrendered by the State, and the lands transferred to private parties, discharged from the trust for the public purposes of navigation and fishery, are not supported by any reasons or authorities that we are bound to respect. The interest of the people in navigation and in the fisheries can be improved rather than impaired by the disposition of parcels of the lands under the waters in front of the commercial parts of the city, for wharves and docks, and of parcels remote from the city front, and useful only for fishing purposes, for the shore rights of fishermen. But the abdication by the State of the general right to govern the lands under the waters of an entire lake for the benefit of the whole people is a different matter, and cannot be sustained or justified. It is contrary to the principles upon which the trust with which the State holds such lands is founded. It is inconsistent with the purposes for which they are held by the State, and with the exercise of the full power of government over them which the State is bound to maintain unimpaired. The ownership of the navigable waters of the harbor of Chicago, and of the lands under them, by the State, is different in character from that which the State has in lands intended for sale. It is a trust power, which the State cannot abdicate any more than it can abdicate its police powers in the administration of government and the preservation of the peace

bursable of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * * So with trusts connected with public property, or property of a special character, like *lands under navigable waters*, they cannot be placed *entirely beyond the direction and control of the State*.

* * * * * * * * * *

* * * It is hardly conceivable that a legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust under which it is held. So would a similar transfer to a corporation of another State. *It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself.* * * *

* * * * * * * * * *

* * * We hold, therefore, that any attempted cession of the ownership or control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, * * *. (Emphasis supplied.)

The Supreme Court of the State of Ohio adopted the reasoning of *Illinois Central* in two cases involving ownership of the soil beneath the waters of Lake Erie. In *State v. Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 79, 80 (1916), that court said:

[illegible]

[illegible]

[illegible]

order of March 5, 1973, this Court ruled that, regardless of the justice of Ohio's historical claim, she had lost the right to assert it because of the long acquiescence of her officials in the adverse claim of Kentucky. 410 U.S. 641, 642-652. The Court relied on a series of cases which begin with *Rhode Island v. Massachusetts*, 4 How. 591 (1846).

The *Rhode Island* case was the first boundary dispute between States to be litigated to a conclusion before this Court. That litigation continued for many years as the Court carefully picked its way through an unfamiliar field, which, though political in nature, had been committed to its jurisdiction under the Constitution. See 12 Pet. 657 (1838); 13 Pet. 23 (1839); 14 Pet. 210 (1850); 16 Pet. 233 (1841); 4 How. 591 (1846). In the last of these decisions, written by Justice McLean, the Court finally rejected Rhode Island's claim on the ground that, in 1711 and again in 1718, the legislature of the Colony of Rhode Island had formally agreed with the legislature of the Colony of Massachusetts as to the location of the boundary, and that, thereafter, Rhode Island had acquiesced in this agreement for forty or fifty years before beginning its effort to have it set aside on the ground that it was based on a mistake. 4 How. at 638-639. This is the opinion on which this Court now relies.

One of the earlier opinions in this series has been cited at times in support of the defense of acquiescence. *Rhode Island v. Massachusetts*, 14 Pet. 210 (1840). Chief Justice Taney, writing for the majority there, held that a formal legislative agreement between States, and acquiescence by one State in the long continued possession of territory by another, constitute separate and independent defenses. 14 Pet. at 258-261. Justice McLean dissented on the ground that a legislative agreement followed by long acquiescence must be considered together as one defense.

14 Pet. at 676-79. Six years later, however, Justice Baldwin followed the reasoning of this dissent in writing the majority opinion in the finally dispositive decision in which we have just referred to in the previous paragraph. Only Chief Justice Taney dissented. 4 How., at 639-646.

The *Rhode Island* decision is therefore consistent with the preceding section of this brief. The basis of the decision was not simply that Rhode Island had acquiesced in the Massachusetts claim. Rhode Island, by an act of its legislature, entered into a solemn agreement with Massachusetts settling the disputed boundary, and for a considerable time thereafter acquiesced in that agreement.

The cases which follow *Rhode Island* reveal a similar pattern. The acquiescence argument appears in conjunction (1) with an act of the legislature, as in *Rhode Island*; (2) with an acknowledgment of the location of the boundary in the State Constitution; or (3) with a decision on the question by an authorized tribunal; or (4) with acts of Congress prior to the State's admission to the Union. In the first group are *Virginia* v. *Tennessee*, 148 U.S. 503, 520-525 (1893), and *Indiana* v. *Kentucky*, 136 U.S. 479, 513-515 (1890). In the second are *Michigan* v. *Wisconsin*, 270 U.S. 295, 301-307 (1926), and *Maryland* v. *West Virginia*, 217 U.S. 1, 30-31 (1910). *Vermont* v. *New Hampshire*, 289 U.S. 593, 598-600, 617 (1933), is representative of the third class. And in the fourth is *Louisiana* v. *Mississippi*, 202 U.S. 1, 36-47 (1906); cf. also *Missouri* v. *Iowa*, 7 How. 660, 670-674 (1849). We do not say that the line between mere acquiescence in adverse possession, and acquiescence in a proper legislative act, has always been carefully drawn in these opinions. But, as this Court said in *Illinois Central Railroad* v. *Illinois*, supra, 146 U.S. at 463:

> "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. . . ." (Emphasis supplied.)

To construe the language of these cases as this Court has done in its order of March 5, 1973, is to read them in a way which conflicts with *California*, *Pollard* and *Illinois Central Railroad*.

The State of Ohio, which, for present purposes, must be assumed to have included the soil beneath the northern half of the Ohio River within her boundaries at the time she entered the Union, has never taken any legislative action to dispose of that trust property. Efforts were made in 1813, in 1848, in 1877, in 1958, and perhaps at other times, to work out a settlement of the location of Ohio's boundary in the River. All were futile. The acquiescence of her officials in the adverse possession of Kentucky, and their laches in asserting her trust rights, cannot deprive the State of Ohio of those rights, any more than the acquiescence and laches of federal officials could deprive the United States of her trust property in the soil beneath the marginal sea in *United States* v. *California*, *supra*. And the State of Ohio, not being a party to either *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), or *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), to which this Court referred in the order of March 5, 1973, is not bound by those decisions. *Fowler* v. *Lindsey*, 3 Dallas 411 (1799); *New York* v. *Connecticut*, 4 Dallas 4 (1799); *Hinderlider* v. *LaPlata Co.*, 304 U.S. 92, 103 (1938); *United States* v. *Nevada*, No. 59, Original, decided June 11, 1973.

CONCLUSION

In view of the foregoing, the Motion for Reconsideration of the Court's order of March 5, 1973, should be granted and referred to the Special Master for consideration and recommendation.

Respectfully submitted,
WILLIAM J. BROWN
Attorney General of Ohio,
GEORGE L. JENKINS
First Assistant Attorney General
JAMES A. LAUDERBACK
Chief Counsel
JOSEPH M. HOWARD
Assistant Attorney General

April, 1974

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Assistant Attorney General of The State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1974, I served copies of the foregoing second motion for leave to file, motion for reconsideration and brief in support, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Assistant Attorney General

OHIO v. KENTUCKY

ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT

No. 27, Original. Argued January 20, 1972.—Decided March 1, 1972

Ohio sought leave to file an amended bill of complaint in an original action involving a boundary dispute with Kentucky. By the amendment Ohio claimed that the boundary between Ohio and Kentucky was located in the middle of the Ohio River. The motion was referred to the Special Master, who recommended that the motion be denied. *Held:*

1. In the exercise of its original jurisdiction, this Court is not inexorably bound by indigenous procedure or by current rules of civil procedure. The requirement of a motion for leave to file a complaint permits this Court to dispose of it at a preliminary stage in an appropriate case, such as where the claim is barred as a matter of law and a hearing on the issues presented would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants alone bear. Pp. 643-644.

2. Ohio's long acquiescence in the location of the Ohio-Kentucky line at the northern edge of the Ohio River bars Ohio's present claim that the boundary is at the middle of the river. Pp. 646-652.

Motion for leave to file amended bill of complaint denied.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, post, p. 652.

Joseph M. Hoxsted argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the brief was *William J. Brown*, Attorney General of Ohio.

John B. Breckinridge, Assistant Attorney General of Kentucky, argued the cause for defendant *pro hac vice* in answer to exceptions to the Report of the Special Master. With him on the brief were *Ed W. Hancock*,

Attorney General, and *James M. Rogge*, Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Almost seven years ago, in March 1965, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that this Court declare and establish:

"1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792.

"2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the ownership of the soil under the river and structures permanently annexed thereto."

In its complaint Ohio alleged:

"4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.

"5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that seventh act of the Virginia Legislature entitled 'An Act concerning the erection of the district of Kentucky into an independent state,' passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.

Ohio were on its shore. From 1910 to 1929, the United States created locks in the Ohio River for navigational purposes. Since 1955, it has been replacing the earlier locks with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. "As a result, the shores or banks of the Ohio River have been moved farther northerly and southerly as the water levels have increased by the damming of the river." The north low water mark of 1792 "has been obscured by the increased elevation of the water levels." Kentucky has claimed that the line between the two States is "along the present northerly shore line of the Ohio River rather than the 1792 northerly low water mark which is located to the south of the present south shore line." Ohio "does now and has always claimed . . . that the boundary between it and Kentucky is the 1792 northerly low water mark."

Leave to file the bill of complaint was granted. 384 U. S. 922 (1966). Kentucky by its answer admitted the allegations of the above-quoted numbered paragraphs of Ohio's complaint. The Court then appointed the Honorable Phillip Forman as Special Master in the case. 385 U. S. 808 (1966).

Five years later, in August 1971, Ohio moved for leave to file an amended complaint. By this amendment Ohio would assert that the boundary between it and Kentucky is the middle of the Ohio River, or, only alternatively, is the 1792 low water mark on the northerly

---

[1] [illegible] 1 Stat. 189.